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# State v. Evans Appellant's Reply Brief Dckt. 39888

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39888
	)	
v.	)	ADA COUNTY NO. CR 2007-1371
	)	
KIRKLEY ALLEN EVANS,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	

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REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA

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HONORABLE MICHAEL E. WETHERELL  
District Judge

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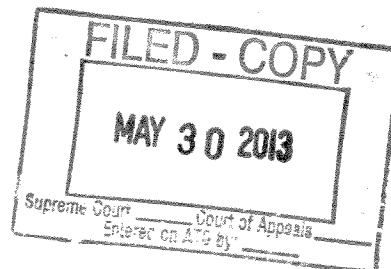
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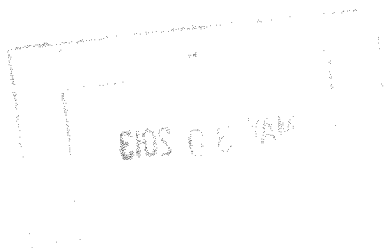
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## STATEMENT OF THE CASE

### Nature of the Case

Kirkley Evans appeals following the district court's denial of his motion for credit for time served. Mr. Evans asserts that the district court erred when it denied his motion requesting credit for time served on his consecutive state sentence, as he was booked into the Idaho Department of Correction ("IDOC") facility on his state sentence and remained in the IDOC facility for five days before he was transported to the federal facility to serve his federal sentence.

### Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Evans' Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

## ISSUE

Did the district court err when it denied Mr. Evans' motion for credit for time served?

## ARGUMENT

### The District Court Erred When It Denied Mr. Evans' Motion For Credit For Time Served

#### A. Introduction

Mr. Evans asserts that the district court erred when it denied his request for credit for time served. First, although Mr. Evans' state sentence was ordered to run consecutively to the federal sentence, Mr. Evans was taken to the state facility, booked in, and processed, and actually began serving his state sentence. Second, in light of the information known to the district court at the time that it denied his request, he was entitled to five days of credit for time served on the state sentence, as he was actually in the state facility for five days<sup>1</sup> before being transported to the federal facility. For the reasons set forth herein, he respectfully requests that this Court order that he be given credit for time served in the amount of five days.

#### B. This Court Has Jurisdiction To Consider Whether Mr. Evans Should Be Granted Credit For Time Served

The State claims that the district court does not have jurisdiction to entertain a request for credit for time served in this case as Mr. Evans' sentence was not an illegal sentence under I.C.R. 35(a). (Respondent's Brief, p.5.) The State is inaccurately characterizing the motion for credit for time served as a motion to correct an illegal sentence under I.C.R. 35(a); however, Mr. Evans' motion was made pursuant to I.C.R. 35(c).

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<sup>1</sup> Although Appellant's Brief calculated the time from August 21, 2008 to August 25, 2008 to total 4 days, on further calculation, it appears that this number was miscalculated, such that Mr. Evans is requesting 5 days of credit for time served.

The applicable Idaho Criminal Rule, Rule 35(c), refers to the code section cited by Mr. Evans and explains when such a motion for credit for time served can be made: “[a] motion to correct a court’s computation of credit for time served, granted pursuant to Idaho Code Sections 18-309 or 19-2603, may be made at any time.” Under Rule 35(c), the district court is authorized, at any time, to correct an error in the computation of a defendant’s sentence. I.C.R. 35(c). Thus, the district court did have jurisdiction to determine whether Mr. Evans should be granted credit for time served.

The State claims that the calculation of a sentence after it is executed is the exclusive domain of the Idaho Department of Correction. (Respondent’s Brief, p.5.) The State is incorrect in its assertion that I.C. § 18-309 is only applicable to credit for time incurred “prior to entry of judgment.” (Respondent’s Brief, pp.5-6.) I.C. § 18-309 provides for both prejudgment and post-judgment credit for time served.<sup>2</sup>

Idaho Code § 18-309 should be read to include time served both pre- and post-judgment. Because I.C.R. 35(c) provides that a correct computation of time served may be made at any time, and I.C. § 18-309 does not prohibit or restrict the calculation of time served to pre-judgment incarceration, time served after a judgment of conviction has been entered should be included in the court’s calculation of credit for time served under I.C.R. 35(c).

The Idaho Court of Appeals, in *State v. Albertson*, 135 Idaho 723 (Ct. App. 2001), held that:

The second sentence of § 18–309 addresses the time served after the entry of judgment. It states that the “remainder of the term commences upon the pronouncement of sentence,” implying that all time spent in

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<sup>2</sup> A petition for habeas corpus is another means by which Mr. Evans could have obtained review of the calculation of credit for time served.



custody after sentencing is credited to the defendant's sentence. The decisional law of this state has consistently applied this provision so as to allow credit against a sentence for any time spent in custody after the entry of judgment, except periods of county jail incarceration that were served as a condition of probation. In *State v. Banks*, 121 Idaho 608, 610, 826 P.2d 1320, 1322 (1992), the Idaho Supreme Court held that a period of confinement served solely as a condition of probation is not counted as time served on the suspended sentence if the probation is subsequently revoked. Any other periods of post-judgment incarceration, however, must be credited to the sentence.

*Albertson*, 135 Idaho at 725 (internal citations omitted) (emphasis added).

Thus, where Mr. Evans was sentenced in the state case on August 21, 2008 and immediately taken to the IDOC new inmate processing facility where he remained from August 21, 2008 through August 25, 2008, he should receive credit for the five days that he was in custody.

C. Mr. Evans Did Not Waive The Credit For Time Served Issue

In its Respondent's Brief, the State contends that Mr. Evans failed to request credit for the five days below, and is raising this issue for the first time on appeal. (Respondent's Brief, p.8.) This contention has no merit.

As Mr. Evans stated in his Appellant's Brief, his *pro se* Motion for Credit for Time Served requested credit "for all local, county and state time served in conjunction with this charge." (Appellant's Brief, pp.2-3, n.3.) Although Mr. Evans also requested credit for the total number of days he served in federal custody, on appeal Mr. Evans is narrowing his request for credit for the five days he was in IDOC custody in August 2008.

Because Mr. Evans began serving his state sentence when he was booked into IDOC custody on August 21, 2008, he should have received credit on his state court

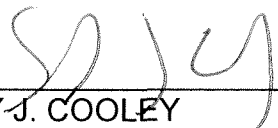
sentence for the five days he served in IDOC custody, from August 21, 2008 to August 25, 2008.

Mr. Evans asserts that, because the facts in the record show that he is entitled to at least five days of credit for time served, the district court erred when it denied his request for credit for time served. This Court should hold that Mr. Evans is entitled to credit of five days for the period of incarceration following his August 21, 2008 sentencing on the state case.

#### CONCLUSION

Mr. Evans respectfully requests that this Court order that he be given additional credit for time served.

DATED this 30<sup>th</sup> day of May, 2013.

  
\_\_\_\_\_  
SALLY J. COOLEY  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

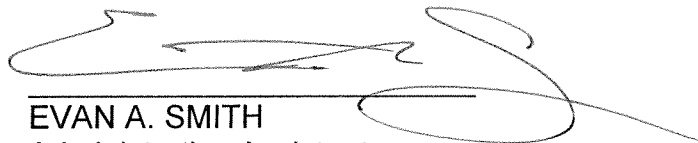
I HEREBY CERTIFY that on this 30<sup>th</sup> day of May, 2013, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

KIRKLEY ALLEN EVANS  
INMATE #69608  
ICC  
PO BOX 70010  
BOISE ID 83707

MICHAEL E WETHERELL  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

KENNETH K. JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
P.O. BOX 83720  
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Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH  
Administrative Assistant

SJC/eas